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In the Supreme Court of the United States

OCTOBER TERM, 1974

MAURICE SCHICK, PETITIONER

v.

GEORGE J. REED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (App. 59) is reported at 483 F. 2d 1266. The order of the district court (App. 57) is unreported. The several opinions of the Army Board of Review and of the Court of Military Appeals, and the action by the President, on petitioner's original conviction are reprinted at App. 4-35.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1973. A timely petition for rehearing and rehearing *en banc* was denied on October 1, 1973. The petition for a writ of certiorari was filed on October

31, 1973, and was granted on April 22, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the President's commutation of petitioner's court-martial sentence of death to a sentence of life imprisonment without benefit of parole was unlawful when made.

2. Whether *Furman* v. *Georgia,* 408 U.S. 238, retroactively invalidates the no-parole condition of the commutation.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, of the Constitution provides, in pertinent part:

> The Congress shall have Power * * * [t]o make Rules for the Government and Regulation of the land and naval Forces; * * *

Article II, Section 2, provides in pertinent part:

> The President shall be Commander in Chief of the Army and Navy of the United States, * * * * and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

10 U.S.C. 871, U.C.M.J., Art. 71, provides in pertinent part:

> (a) No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

10 U.S.C. 918, U.C.M.J., Art. 118, provides in pertinent part:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—(1) has a premeditated design to kill; * * * is guilty of murder, and shall suffer * * * death or imprisonment for life as a court-martial may direct.

18 U.S.C. 4202 provides:

> A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

STATEMENT OF THE CASE

The facts are undisputed. Petitioner, Maurice Schick, then a master-sergeant in the United States Army, was tried by general court-martial in March 1954 for the murder of an eight-year-old girl at a dependent housing project near Camp Zama, Tokyo, Japan. The victim was the daughter of one of the officers assigned to the camp. Petitioner admitted killing the child by choking and drowning her. His defense was that he was insane at the time he committed the crime. Psychiatric testimony was presented by both the prosecution and defense at trial. The court-martial rejected petitioner's defense of in-

sanity, convicted him of premeditated murder under Article 118, Uniform Code of Military Justice (10 U.S.C. 918, *supra,* p. 3), and sentenced him to death (App. 4–6).

An Army board of review affirmed the conviction and sentence (App. 4). The case was then forwarded to the Court of Military Appeals, which, after receiving a report based on further psychiatric examination of petitioner, remanded the case to the board of review for reconsideration of the sanity issue (App. 9). After considering additional professional evaluation of petitioner's psychiatric reports, as well as the earlier psychiatric evaluations, the board of review again affirmed the findings and sentence (App. 12). The Court of Military Appeals affirmed by a vote of 2 to 1 (App. 20). As required by statute in all cases where the death sentence has been imposed (10 U.S.C. 871 (a), U.C.M.J., Art. 71(a), *supra,* p. 2), the case was forwarded to the President for final review.

In 1960 President Eisenhower, exercising his authority under Article II, Section 2, of the Constitution, commuted petitioner's death sentence to "confinement at hard labor for the term of his natural life," with the express condition that he "shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder * * *" (App. 35). The President then ordered the sentence executed, as modified, and directed that petitioner be committed to the custody of the Attorney General (*ibid*). Petitioner was

accordingly dishonorably discharged from the Army, and transferred to the federal penitentiary at Lewisburg, Pennsylvania.

Petitioner has served 20 years of his life sentence; he would have been eligible for parole consideration in March, 1969 but for the provision in President Eisenhower's commutation of his death sentence that the parole statutes not apply to petitioner. See 18 U.S.C. 4202, *supra,* p. 3.

In 1971, petitioner sought a declaratory judgment in the United States District Court for the District of Columbia to require the United States Board of Parole to consider him for parole (App. 36). On November 9, 1971, Judge George L. Hart, Jr., after hearing, dismissed the case for lack of subject matter jurisdiction (App. 41). The court of appeals summarily reversed and remanded the case to the district court for further action (App. 56). On March 29, 1972, Judge Hart granted the Board of Parole's motion for summary judgment (App. 57). The court of appeals affirmed, one judge dissenting (App. 59). The panel was unanimous in upholding the President's initial power to commute a death sentence to life imprisonment without possibility of parole (App. 60–63, 65), but split on the question of the retroactive application of *Furman* v. *Georgia,* 408 U.S. 238. The majority held that *Furman* should not be applied retroactively so as to void the no-parole condition of the commutation since, in the absence of Presidential approval, petitioner was never effectively sentenced to death, and, at all events, the tentative death sentence was superseded long before *Furman* was decided. Judge

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Wright, in dissent, argued that *Furman* required vacation of petitioner's death sentence and substitution of "the only other sentence which lawfully could have been imposed—life imprisonment with the possibility of parole" (App. 65).

SUMMARY OF ARGUMENT

1. President Eisenhower's 1960 commutation of petitioner's 1954 death sentence to life imprisonment without parole was lawful and well within the power "to grant reprieves and pardons" accorded the President by Article II, Section 2, of the Constitution. Petitioner's contention that the President has the power to commute only to a lesser punishment provided by Congress as an alternative penalty for the particular offense is supported neither by decisions of this Court nor by considerations of policy. We recognize that the President in commuting must actually reduce the sentence, and that his power to commute is limited by the Eighth Amendment. Assuming, moreover, that, other constitutional restrictions aside, the President cannot commute to a sentence wholly alien to our law, that proposition would not control this case: life imprisonment without parole is provided for by statute in federal law as well as in the law of twenty states. Furthermore, Congress has made its intention clear, both in the original parole statute and in the statute which sent petitioner's case to the President, that the President's power to commute should be unfettered by Congressional enactments.

2. This Court's decision in *Furman* v. *Georgia,* 408 U.S. 238, was rendered while the present case was pending on appeal, and the possibility of its direct applicability to this case was only brought to the attention of the court of appeals at oral argument. Because of the manner in which the question arose, no one focused upon the underlying question of whether *Furman* applied at all to death sentences imposed by courts-martial. This issue was not involved in *Furman,* and has never been decided by this Court nor by any court of appeals. Military discipline requires a separate jurisprudence with its own unique need for the death penalty for purposes of deterrence. Moreover, military law provides for three levels of review of the propriety of death sentences, including in every case review by the President. Accordingly the considerations which prompted some members of majority in *Furman* may not apply to the law governing the military. However, should the Court deem it necessary to decide this issue, we would urge a remand so that a full evidentiary record can be made.

3. In any event, even if *Furman* should be held applicable to the military, it should not be applied retroactively in a manner to void a death sentence, later commuted, which was legal when imposed. To go so far, we submit, would ignore the one consistent theme of the five concurring opinions in *Furman,* namely, that only by 1972, the date the case was decided, had moral attitudes and practices in this country developed to the point where the death

penalty, as imposed pursuant to discretionary statutes, violated the Eighth Amendment.

ARGUMENT

I. PRESIDENT EISENHOWER ACTED LAWFULLY IN COMMUTING PETITIONER'S DEATH SENTENCE TO A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE

The President's power to commute criminal sentences derives from that provision of Section 2 of Article II of the Constitution which authorizes the Chief Executive "to grant reprieves and pardons for offenses against the United States." To be sure, the Constitution does not use the word "commutation" and the question was early put to this Court whether the President had power under the "reprieves and pardon" clause to grant less than a full pardon, as by commuting a death sentence to a sentence of life imprisonment. The issue was settled in *Ex parte William Wells*, 18 How. 308, where the Court upheld a pardon "* * * upon condition that [Wells] be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington." *Id.* at 308, 315. See, also, *Schwab* v. *Berggren*, 143 U.S. 442, 451; *Biddle* v. *Perovich*, 274 U.S. 480, 487. So much is common ground: that the President has constitutional power to grant a commutation of sentence, defined (to borrow petitioner's words, Br. 23) as "the substitution of a lesser, different type of punishment for the punishment actually imposed * * * at trial."[1]

Petitioner argues, however, that the President is without power to commute to any lesser punishment not expressly provided by Congress as an alternative penalty for the particular offense (Br. 24–33). We find no basis for any such limitation of the President's pardon power.

Certainly, the suggested restriction is not required by prior decisions of this Court. Indeed, in *Wells*, *supra*, the Court approved commutation of a death sentence to "imprisonment for life in the penitentiary of Washington" without thinking it necessary to point to any Act of Congress specifically providing for such a penalty. The language petitioner quotes (Br. 27) to the effect that in England the King was not permitted (after a certain date) to commute sentences to transportation or exile, is a reference to specific acts of Parliament regulating those two punishments (39 Eliz. I c. 4 and 5 Geo. IV c. 84, see 18 How. at 313) which have no counterpart in this country. In light of the serious constitutional question presented, it would be extravagant to read that

[1] Like petitioner, we treat President Eisenhower's action in this case as an exercise of his constitutional power to commute sentences—existing independently of 10 U.S.C. 871(a). That, it seems to us, is the plain implication of the document by which the President changed respondent's sentence. See App. 35. In this respect, we accept the analysis of the dissenting opinion below (App. 71) to the effect that Article 71(a)—at least as applied here—merely requires the President, *sua sponte*, to consider executive clemency.

passage as condoning any legislative attempt to control the President's pardon power.

The *Biddle* opinion no more supports the proposed limitation. Petitioner quotes Mr. Justice Holmes as saying: "The only question is whether the substituted punishment was authorized by law * * *" (Br. 26). But he omits what immediately follows: "* * *—here, whether the change is within the scope of the words of the Constitution, Article II, § 2: 'The President * * * shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.' " 274 U.S. at 487. Thus, the controlling law that Justice Holmes looked to was the Constitution, not the statute creating the offense.

Nor is there any sound reason of policy arguing in favor of the suggested restriction of Executive power. Suppose a statute imposing a mandatory death penalty for a particular offense (which we assume, for present purposes, *Furman* does not invalidate): is the President precluded from commuting the sentence to life imprisonment because Congress has not provided that alternative in the particular case? So, also, if petitioner's contention is accepted, it must mean that executive clemency cannot reduce a prison term below the minimum provided by law—or at all when the judge has imposed that minimum sentence (see, *e.g.*, 18 U.S.C. 2113(e)). That would make nonsense of the controlling statute in this case (10 U.S.C. 871(a), *supra*, p. 2) which authorizes the President, in the event of *every* sentence affecting a general or flag officer, to approve "such part, amount,

or commuted form of the sentence as he sees fit"—presumably regardless of what minimum is established by the relevant article of the Uniform Code of Military Justice. And see 18 U.S.C. 568 (1940 ed., now 18 U.S.C. 3570) confirming the President's "full discretionary power to pardon or remit, *in whole or in part*" either portion of a sentence that includes both a fine and imprisonment. Only if the Constitution absolutely compelled it, would one adopt the inflexible rule petitioner proposes, the practical effect of which would often be to deter *any* exercise of Executive clemency. In fact, nothing in Article II restricts the commutation power in this way.[9]

[9] There is no analogy between the President's options when exercising the constitutional power of commutation and the alternatives open to a court on resentencing. The latter is bound to impose a penalty prescribed by the statute defining the offense; the President is not. Thus, in this case, even if the death sentence originally imposed were deemed a nullity in light of *Furman* and the military courts were bound to substitute a sentence of life imprisonment with normal eligibility for parole, that would not necessarily be the end of the matter—contrary to what Judge Wright assumed, dissenting below (App. 66–67). The President would still be free to exercise his constitutional discretion to reduce that sentence. And, of course, any commutation of the life sentence (as opposed to a suspension of the sentence or a full pardon) would necessarily involve the substitution of a sentence *not* prescribed by Article 118.

We find it difficult to believe that petitioner would oppose Presidential action which commuted his sentence to, say, twenty years' imprisonment, thus effecting his immediate and unconditional release. Yet, the logic of his argument is that such a step would be unlawful because, besides death, the only penalty specified in Article 118 is life imprisonment.

This is not to say that there are no limits to the President's power of commutation. First, of course, the substituted penalty cannot be more severe than that provided by the original sentence.[3] And, whether harsher or not, the new penalty must not itself be cruel and unusual in violation of the Eighth Amendment,[4] nor overstep any constitutional boundary. It may be, moreover, that the President cannot create novel or bizarre punishments, wholly alien to our law. But there is nothing of that kind here. All President Eisenhower did was to commute petitioner's death sentence to a wholly familiar alternative penalty,

[3] We take it as settled that life imprisonment, even without possibility of parole, is a lesser penalty than death. See *Biddle* v. *Perovich*, *supra*, 274 U.S. at 486. If that option is no longer available today, it is only because the death penalty prescribed by Article 118 has been effectively eliminated by the *Furman* decision, leaving only life imprisonment with normal parole eligibility as the sole permissible initial sentence. We recognize, of course, that a no-parole condition realistically must be viewed as increasing the "penalty" or "punishment." See *Warden* v. *Marrero*, No. 73-831, decided June 14, 1974, slip op., pp. 8-10.

[4] Petitioner suggests in a footnote that life imprisonment without benefit of parole may be a cruel and unusual punishment as imposed in this case (Br. 29, note 11). This Court has never held such a sentence to violate the Eighth Amendment, and there is no evidence in the record to support the proposition that the sentence here, or similar sentences, have been wantonly imposed, imposed in a discriminatory manner, or that they serve no useful purpose in terms of deterrence or protection of the public. This is not a question that should be decided on the record of this case, without the opportunity to present expert evidence on the usefulness and effect of such sentences. Indeed, it is not an issue presented by the petition for certiorari, which, in relevant part, challenges the substituted sentence only as "not authorized by law" (Pet. 2, Question 2).

indeed one prescribed by the statute under which he was convicted (10 U.S.C. 918), namely, imprisonment for life. The only feature of the commutation that can be complained about is the allegedly "original" condition that the parole statutes should not apply to petitioner.

The question, then, is whether this no-parole restriction amounts to the invention of a new punishment, entirely unknown to our law. Plainly, it does not. For most of the Nation's history, premature release by way of parole was the exception, not the rule. It was not until 1910 that automatic eligibility for parole was generally made available in the federal system (Act of June 25, 1910, 36 Stat. 819), and, for those sentenced to life imprisonment, not until three years later (Act of January 23, 1913, 37 Stat. 650). At all events, one can point to current or very recent provisions of both federal and state law that deny parole in some circumstances. *E.g.*, 26 U.S.C. (1964 ed.) 7237(d); 21 U.S.C. 848(c) (continuing criminal enterprise involving narcotics); 9 Ann. Laws Mass., ch. 265, § 2 (first-degree murder); Nev. Rev. Stat., Tit. 16, ch. 200.030, § 6, ch. 200.320, § 1, ch. 200.363, § 1(a)(1973) (first degree murder, kidnapping, and forcible rape).

Nor is there anything foreign to our system of jurisprudence in imposing a no-parole condition in the case of a life sentence. Indeed, current federal law permits a life sentence without possibility of parole for some narcotic offenders. 21 U.S.C. 848 (a), (c). And there

are no less than 20 states in which parole eligibility—at least without the Governor's approval—is expressly denied to all or some who are sentenced to life imprisonment.[5] Moreover, even where there is no statutory rule, it is not unusual for a prisoner to serve out his remaining life in prison. In the federal system, that may happen more or less predictably because, when convicted, his life expectancy does not exceed fifteen years, or because it is foreseeable that parole will be denied. In many state systems, a very long sentence will assure that result. See, *e.g.*, *United States* v. *Ragen*, 146 F. 2d 349, 351–352 (C.A. 7). The upshot is that imprisonment for life is not an uncommon occurrence in American criminal law.

[5] Ariz. Rev. Stats., Tit. 31, § 443 (all life sentences); West's Ann. Cal. Penal Code, §§ 644, 3050 (kidnapping for extortion and robbery); Colo. Rev. Stat., ch. 39, Art. 18, § 4.7 (assault by prisoners); Hawaii Rev. Stat., ch. 353, § 64 (first degree murder); Idaho Code, Tit. 20, § 223 (murder with sexual attack); Iowa Code, ch. 247, § 247.5 (all life sentences); Ky. Rev. Stat. 435.090 (rape); La. Rev. Stat., Tit. 15, § 571.7 (all life sentences); 4A Ann. Laws, Mass., ch. 127, § 133A (first degree murder); Mich. Stat. Ann. § 28.2304 (first degree murder); Miss. Code, § 47–7–3 (confirmed and habitual criminal); Nev. Rev. Stat., ch. 200, §§ 030, 363, 320 (first degree murder, rape, kidnapping in first degree); N.H. Rev. Stat., ch. 4, § 25 (all life sentences); Baldwin's Ohio Rev. Code Ann., Tit. 29, § 2967.13 (first degree murder); Okla. Stat. Tit. 57, § 332.7 (all life sentences); Purdon's Penn. Stat. Tit. 61, § 331.21 (all life sentences); S.D. C.L. 1967, §23–60–15 (all life sentences); Vt. Ann. Stat., Tit. 28, § 904 (all life sentences); Michie's W. Va. Code, §§ 62–3–15, 61–2–14a, 61–2–15 (first degree murder, aggravated kidnapping and rape); Wyo. State., Tit. 7, § 325 (all life sentences).

We need look no further. No congressional expression could bind the Chief Executive in this matter, directly confided to him by the Constitution. "This [pardon and commutation] power of the President is not subject to legislative control. * * * The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions". *Ex parte Garland*, 4 Wall. 333, 380. The principle is part of the system of separation of powers. *Ex parte Grossman*, 267 U.S. 87, 119–122. Quite properly, Congress has observed that limitation in the statutes relevant here.

We have already noticed 10 U.S.C. 871(a), which expressly confirms the President's power to commute a sentence that must come to him for review to *any* lesser sentence, "as he sees fit." No restriction is to be found there. Nor does the statute creating the military offense of murder (10 U.S.C. 918, *supra* p. 3) circumscribe the commutation power in any way relevant to this case. Petitioner presumably would contend, and we would dispute, that this provision leaves the President only the single option of life imprisonment when commuting a death sentence. But what *is* clear is that Article 918 itself does not prejudice the question of eligibility for parole. We turn then, to the general parole statute, 18 U.S.C. 4202 (*supra*, p. 3).[6]

[6] This provision would govern petitioner's case, but for the no-parole condition, because he is confined in a civilian penitentiary. See 10 U.S.C. 858. Had he been kept in military custody, a comparable parole regulation would have been applicable. See 10 U.S.C. 952; Army Regulation 190–26, Ch. 1, para. 1–4(a)(2) (March 20, 1972).

Here we encounter what seems, at first blush, a universal rule entitling every federal prisoner to claim premature release. It is, of course, no more than an *eligibility* for parole, not a promise that it will be granted. But, more important, the formula laid down in the statute is not in fact invariable. Another section of the Criminal Code expressly empowers judges at sentencing to hasten parole eligibility. See 18 U.S.C. 4208(a). See, also, 24 D.C. Code 201c. And, as we have noted, there are provisions barring parole altogether in certain cases (*e.g.*, 21 U.S.C. 848(e)), or delaying eligibility (*e.g.*, 22 D.C. Code 2404). This Congressional power to make exceptions is beyond question. See *Bradley* v. *United States*, 410 U.S. 605; *Warden* v. *Marrero*, No. 73-831, decided June 19, 1974. Surely, it must follow that the President, exercising independent constitutional authority, is equally free to do so.

At all events, when we look at the history of the parole statute, it is clear Congress was careful not to attempt any interference with the exercise of Executive clemency. Indeed, as originally enacted, 18 U.S.C. 4202 contained the following provision (Act of June 25, 1910, Section 10, 36 Stat. 819, 821):

> That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case * * *.[7]

[7] This provision appeared in Title 18, U.S.C., Section 723, in the 1940 and 1946 editions. Although the provision does not appear in the 1948 revision of Title 18, the Reviser's note to Section 3570 (H. Rep. No. 304, to accompany H.R. 3190, House

No doubt, that language was primarily addressed to the situation in which a Presidential commutation directed release of a prisoner *before* he would be eligible for parole under the statute. But, literally and logically, it applies equally to the converse also. In both cases, the underying principle is simply that the Presidential prerogative to grant clemency is not subject to legislative control.

Finally, we note that what was done here is far from unprecedented. It is reported that President Wilson at least twice imposed a no-parole condition in commuting sentences, the first instance involving the substitution of life imprisonment for a death sentence, as here. See 41 Op. A. G. 251, 254. Before this case, President Eisenhower, after advice from Attorney General Brownell (41 Op. A. G. 251), took like action in commuting at least five military death sentences. See *United States* v. *Vigneault*, 9 C.M.R. 247; *United States* v. *Hagelberger*, 9 C.M.R. 226;[8]

Judiciary Committee, 80th Cong., 1st Sess., at page A171) states:

"Based on title 18, U.S.C., 1940 ed., §§ 568, 723 * * *.

"Words 'pardon or' before 'remit' and 'pardoned or' before 'remitted', were omitted as unnecessary in view of the pardoning power of the President under Const. Art. 2, § 2, cl. 1. 'The power of the President is not subject to legislative control.' *Ex parte Garland*, 1866, 4 Wall. 380. (See also notes of decisions, note 5, U.S.C.A. Const. Art. 2, § 2, cl. 1.)"

[8] Although not challenging the no-parole provision of his commutation, the prisoner sought credit for time served before his death sentence was commuted to 55 years' imprisonment. That claim was rejected by both the district court and the court of appeals. *Hagelberger* v. *United States*, 445 F. 2d 279 (C.A. 5).

United States v. *Gravitt*, 15 C.M.R. 674; *United States* v. *Lee*, 16 C.M.R. 145; *United States* v. *Hurt*, 22 C.M.R. 630. On the last occasion, the no-parole clause was challenged and sustained by the Court of Appeals for the Tenth Circuit. *Hurt* v. *Moseley*, No. 71-1307, decided September 13, 1971 (unreported). And, in two cases, the California Supreme Court has approved such a condition imposed by the Governor in commuting death sentences. *In re Collie*, 38 Cal. 2d 396, 240 P. 2d 275, certiorari denied, 345 U.S. 1000; *Green* v. *Gordon*, 39 Cal. 2d 230, 246 P. 2d 38, certiorari denied, 344 U.S. 886.

We conclude that, at the time, President Eisenhower's action in commuting petitioner's death sentence to one of life imprisonment without possibility of parole was entirely lawful. The remaining question, to which we now turn, is whether this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238, has retrospectively invalidated the no-parole condition attached to petitioner's commuted sentence.

II. THIS COURT'S DECISION IN *FURMAN* V. *GEORGIA*, 408 U.S. 238, DOES NOT AFFECT PETITIONER'S COMMUTED SENTENCE

A. *FURMAN* V. *GEORGIA* DID NOT DETERMINE THE VALIDITY OF DEATH SENTENCES IMPOSED BY COURTS-MARTIAL UNDER MILITARY LAW

This Court's decision in *Furman* v. *Georgia*, *supra*, was rendered while the present case was pending on appeal and was brought to the attention of the court of appeals. But, at the argument, the parties and the court were concerned primarily with the retroactive application of the decision to a death sentence already commuted:[9] No one focussed on the underlying question of whether *Furman* applies at all to convictions by courts-martial. Of course, that issue need not be reached if (as we believe) the court below was correct in holding that *Furman* can in no event affect an already commuted sentence. On the other hand, should this Court disagree, then the question of *Furman's* application in a military setting could become relevant, and we accordingly deal with it here.

The *per curiam* opinion in *Furman* holds "* * * that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. at 239-240. That unexplicated decision must, however, be read together with the separate opinions of those Members of the Court who made up the majority. Some of the reasons given by those who joined in the disposition of the cases were: that capital punishment, as presently administered, serves no valid governmental purpose (*id.* at 312-314, White, J., concurring); that capital punishment is ap-

[9] Although *Furman* was cited by petitioner in his court of appeals brief, it was invoked only by way of analogy for the propositions that life imprisonment without parole was antirehabilitative (Br. 18), amounted to cruel and unusual punishment (Br. 27, 29, 30), and deprived him of equal protection of the laws (Br. 33). At oral argument, as the court of appeals noted (App. 63-64), petitioner also advanced the argument that *Furman* should be applied retroactively to void his 1954 death sentence. Because of the manner in which the issue arose, the question of the retroactivity of *Furman*, as well as the underlying question of its applicability at all to the military, were not briefed by the parties.

plied in a way which discriminates against minorities and the poor (*id.* at 256–257, Douglas, J., concurring); that capital punishment is imposed wantonly and freakishly (*id.* at 310, Stewart, J., concurring). The question arises whether these rationales apply to judgments of courts-martial, bearing in mind that none of the cases before the Court involved a military conviction.[10]

We begin with the Court's admonition in *Parker* v. *Levy*, No. 73-206, decided June 19, 1974, that " '[m]ilitary law * * * is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment' " (*id.*, slip op. at 9). Nowhere is this separateness more real than where capital punishment is concerned. Members of the military deal regularly with deadly weapons. They are often in foreign countries under situations of tension or war. They are required to obey orders that imperil life or limb. In such circumstances, the deterrent of capital punishment in the event of disobedience may be both more necessary and more appropriate than in a civilian setting.

What is more, the system under which death sentences are imposed and confirmed is very different

[10] The Court majority in *Furman* made no reference to military cases. The matter was only mentioned in dissent. Both Mr. Justice Blackmun and Mr. Justice Powell were concerned that the decision might invalidate the death penalty provisions of the Uniform Code of Military Justice (408 U.S. at 412, 417–418), Justice Blackmun noting that such a result, if it follows from *Furman*, would be accomplished "without a passing reference to the reasons, or the circumstances, that prompted [the] enactment [of these provisions]." 408 U.S. at 412.

from the civilian experience criticized in *Furman*. Congress has provided that the appropriateness of every death sentence imposed by a court-martial must be reviewed at the following three levels: first, by the convening authority (Article 64, U.C.M.J.; 10 U.S.C. 864), second, by the Court of Military Review (Article 66, U.C.M.J.; 10 U.S.C. 866), and finally, by the President (Article 71, U.C.M.J.; 10 U.S.C. 871).[11] This extensive process, ending in each case with the President, serves to prevent discriminatory or wanton use of the penalty.

These considerations suggest that *Furman* ought not be held automatically applicable to courts-martial proceedings. Should the Court deem it necessary to reach the issue, we would urge a remand of the case so that a full evidentiary record can be made. Such an important constitutional question ought not be decided, we submit, on the present inadequate record.

B. IN NO EVENT SHOULD *FURMAN* V. *GEORGIA* BE APPLIED RETROACTIVELY TO VOID PETITIONER'S 1954 DEATH SENTENCE

For the purposes of the present argument, we assume, first, that the death sentence imposed by the court-martial in 1954, if it had been left undisturbed, could not now be carried out, and, second, that today, the most severe sentence that could be imposed for a violation of Article 118 would be life imprisonment with the usual eligibility for parole.. But, in our view,

[11] There is, in addition, a mandatory review of the conviction by the Court of Military Appeals when a death sentence has been upheld. Article 67, U.C.M.J., 10 U.S.C. 867. That court, however, has no power to vary the sentence.

it does not follow, in the actual circumstances of the case, that *Furman* voids the 1954 death sentence and the no-parole condition of commutation imposed in 1960. The "retroactivity" of the *Furman* decision does not, we submit, carry so far.

While this Court has used the term "retroactive" in characterizing the application of *Furman*, that has only been to prevent execution of a pending death sentence. *Michigan* v. *Payne*, 412 U.S. 47, 57, n. 14; *Robinson* v. *Neil*, 409 U.S. 505, 508. We are aware of no case which applies *Furman* retroactively in any other context.[12] Furthermore, an analysis of the five concurring opinions in *Furman* reveals that reaching back years, except to prevent present execution, would be inconsistent with the reasoning behind the decision. None of the Justices subscribing to the result intimated that the death penalty had always been constitutionally invalid as cruel and unusual. Rather, each concurring opinion expressed the view that, because of changing moral standards or changing practices, the death penalty must now be viewed as cruel and unusual.

Mr. Justice Douglas noted that the Eighth Amendment "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'" and that the proscription against cruel and unusual punishments "' may acquire meaning as public opinion becomes enlighted by a humane justice'". *Furman*, *supra*, 408 U.S. at 242 (citations

[12] But see *In re Walker*, 10 Cal. 3d 764, 518 P. 2d 1129 (Sup. Ct. Cal.), discussed *infra*, n. 15.

omitted). Mr. Justice Brennan stated that the death penalty is "unacceptable to contemporary society" (*id.* at 277) and that the real question was "whether the deliberate infliction of death is *today* consistent" with the Eighth Amendment. *Id.* at 285 (emphasis added). He concluded that "[t]oday death is a uniquely and unusually severe punishment." *Id.* at 305. Mr. Justice Stewart used the years 1967 and 1968 as his point of reference in concluding that the death penalty was applied "wantonly and freakishly". *Id.* at 309–310. Mr. Justice White condemned the death penalty "as it is presently administered". *Id.* at 312–313. And Mr. Justice Marshall concluded that the death penalty is "morally unacceptable * * * at this time in * * * history." *Id.* at 360.[13] The rationale of *Furman*, therefore, does not justify reaching back twenty years to invalidate a death penalty commuted more than 14 years ago.

In arguing for retroactivity, petitioner analogizes *Furman* to *Gideon* v. *Wainwright*, 372 U.S. 335 (Br. 18–21), which has been accorded full retroactive effect to undo all adverse legal consequences from past convictions obtained without the assistance of counsel. But *Gideon* and *Furman* are not analogous.[14] *Gideon*,

[13] See also the dissenting opinion of Mr. Justice Powell at 434–436.

[14] More closely analogous to *Furman* is *Michigan* v. *Payne*, *supra*, 412 U.S. at 47, which held that *North Carolina* v. *Pearce*, 395 U.S. 711 (limiting the power of a judge to impose a more severe sentence following retrial and conviction after a successful appeal), was nonretroactive.

by recognizing the necessity for assistance of counsel at trial for a reliable determination of guilt or innocence, placed in question the accuracy of all past determinations of guilt where the defendant did not have a lawyer. Thus, a retroactive application was necessary to effectuate its purpose. In *Furman*, on the other hand, the Court only held that by 1972 the death penalty, a punishment long used with the Court's approval, had become cruel and unusual in light of contemporary morals and practices. The effectuation of *Furman* requires no action with respect to a death sentence that has long since been undone by Presidential commutation.[15]

These considerations also dispose of petitioner's alternative contention (Br. 33–34) that, in light of

[15] The state cases cited by petitioner (Br. 13–15) are not persuasive. *State* v. *Baker*, 81 Wash. 2d 281, 501 P. 2d 284, is inapposite. There the defendant was, at the time *Furman* was decided, subject to a pending death sentence, which had merely been deferred. The Supreme Court of Washington held that the issue of whether a trial court could defer the imposition of a death sentence was moot, since under *Furman* the state could not impose the death penalty on the defendant.

In re Wolker, 10 Cal. 3d 764, 518 P. 2d 1129, lends some support to petitioner's position on the retroactivity of *Furman*, because, on substantially similar facts (a 1961 commutation of a 1947 death sentence), the Supreme Court of California rejected arguments analogous to those which we assert here. The critical distinction, however, is that the California Court was not construing *Furman*, but, rather, its own prior decision in *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880 (in which, before *Furman*, the death penalty was held to be cruel and unusual punishment under the California Constitution). Obviously, whether right or wrong, that ruling is no precedent here, in a case which involves the application of a decision by this Court construing the federal Constitution.

Furman, President Eisenhower's action must be viewed as substituting a more *severe* penalty than the original sentence, in violation of the principle of commutation. The flaw in this argument is the same: the assumption that the death penalty was unconstitutional when originally imposed in 1954, and that the only legal sentence then was life imprisonment with eligibility for parole. But *Furman* holds nothing of the sort. Because it would today be impermissible to execute even a twenty-year-old death sentence does not imply that the judgment was invalid when rendered.[16]

[16] Should the Court disagree and accept petitioner's *Furman* argument, we submit the proper disposition would be to vacate the original death sentence and the President's commutation thereof, with the consequence that the alternative penalty provided by Article 118—life imprisonment with normal eligibility for parole—would be substituted. While, in this case, the practical result is the same, it would be wrong, we suggest, simply to strike the no-parole condition of the commutation. Analytically, if *Furman* applies, the substituted sentence must be attributed to Article 118, not to any action of the President.

A somewhat different disposition of the case is called for if the Court were to accept petitioner's alternative argument that, independently of *Furman*, the President cannot attach a no-parole condition to a commutation—at least when the substituted sentence is life imprisonment. Even then, however, we submit striking the restriction alone would not be correct. Indeed, it may well be that the President would have denied clemency altogether if he could not foreclose parole. In those circumstances, the appropriate course would be to set aside the whole of the President's action. The result would be to revive the original death sentence, the execution of which might be prevented by *Furman* (if it applies to military cases) or by a fresh commutation.

CONCLUSION

We do not argue that petitioner should spend the rest of his life in prison or that he should never be relieved of the condition of his commutation and allowed to seek parole. If there are reasons of compassion or rehabilitation that would justify further commutation of the sentence, petitioner is free to request it of the President, who is not bound by the action of his predecessor. See 41 Op. A. G. at 251. Our contention is only that the President's commutation of petitioner's sentence was valid when rendered, remains valid, and should be changed only by Presidential action.

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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